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## Ratchet clause ineffective

In the context of rent review, landlords often desire the peace of mind provided by a ratchet clause. A typical ratchet clause will provide that the rent (as reviewed) is to be no less than the rent payable in the previous year.

In *Oz Sushi Pty Ltd v Lloyd Bennett & Associates Pty Ltd as trustee for the LR Bennett Family Trust* [2002] QDC 220, Judge Brabazon QC of the District Court of Queensland was called upon to consider the operation of a ratchet clause in a lease regulated by the provisions of the *Retail Shop Leases Act 1994* (Qld).

### Facts

The landlord and tenant entered a five-year lease with provision for a five-year option. Rent was fixed for the first two years of the lease. Annual rent for years 3 to 10 of the lease and option was to be reviewed in accordance with the stated method of annual review being either the change in the CPI (in years 3,4,5,7,8 and 10) or a review to market (in years 6 and 9). Despite some ambiguity, it was held that a ratchet clause was intended to apply such that the annual rent, as reviewed for years 3 to 10 inclusively, would not be less than the annual rent payable in the immediately preceding rental year.

For a lease entered into before 1 July 2000 (such as the lease under consideration) the applicable provisions of the *Retail Shop Leases Act 1994* (Qld) were as follows:

Section **27(5)**—"If, under a retail shop lease, the rent is to be reviewed during the term of the lease or any renewal or extension of the lease using more than 1 basis for a rent review, the rent payable for the rental period after the timing of the review is the same as the rent payable before the timing of the review."

Section **36**—"A provision of a retail shop lease is void to the extent that it-

.....

(e) provides for the rent of the leased shop to change on a particular review of the rent in accordance with whichever of 2 or

more methods of calculating the change would result in the higher or highest rent.”

The tenant submitted that the effect of the ratchet clause was that there was more than one basis for rent review with the landlord being entitled to take advantage of the basis producing the highest rental.

The landlord submitted that the effect of the ratchet clause was that the rent would remain the same as the previous year’s rent such that there was no “review” of rent for the purposes of s27(5). As for s36(e), it was submitted that if the rental remained the same there had been no “change” in the rental. In making these submissions the landlord relied upon a previous decision of the Retail Shop Leases Tribunal, given on 20 November 1998 (decision X/98). In that instance the chairman of the Tribunal held that the ordinary meaning of the words “basis for review” did not apply to a similar ratchet provision, as in effect the rent was not reviewed.

## **Decision**

In dismissing the landlord’s first contention, Judge Brabazon Q.C. had no doubt that the ratchet clause operated as a basis for review. If the reviewer was told to look at the CPI index, or at the current market rent (as the case may be), and also told that the rent could not go down then the review must be made using two bases.

As to the landlord’s second contention, the concept of a “change” in the rent was held to include a zero change.

On this basis the ratchet clause was void (in accordance with s36(e)) and the rental payable after the review remained at the same level as before the review (in accordance with s27(5)). As a result the landlord was ordered to refund rental overpayments previously made by the tenant.

## **Comment**

The decision in *Oz Sushi Pty Ltd v Lloyd Bennett & Associates Pty Ltd as trustee for the LR Bennett Family Trust* [2002] QDC 220 confirms the view commonly held by Queensland practitioners that

ratchet clauses of this type are not permissible in leases governed by the provisions of the *Retail Shop Leases Act* 1994 (Qld). Although a previous version of s27 was considered in this instance, the result reached by Judge Brabazon Q.C. will be equally applicable to the legislation in its current form. The decision is to be welcomed given the doubts that were held concerning the previous decision of the Retail Shop Leases Tribunal in relation to the operation of a ratchet clause.

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